

STATE OF HAWAII  
HAWAII LABOR RELATIONS BOARD

In the Matter of  
  
DIRECTOR, DEPARTMENT OF LABOR  
AND INDUSTRIAL RELATIONS,

Complainant,

vs.

KIEWIT PACIFIC COMPANY,

Respondent.

CASE NO. OSAB 97-002

OSHCO NO. N1622

INSPECTION NO. 301421343

DECISION NO. 13

FINAL DECISION ADOPTING  
PROPOSED FINDINGS OF FACT,  
CONCLUSIONS OF LAW, AND ORDER

FINAL DECISION ADOPTING PROPOSED  
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On May 19, 2006, the Hawaii Labor Relations Board (Board) issued its Proposed Findings of Fact, Conclusions of Law, and Order in this matter. As the time limit for the filing of exceptions to the proposed order has passed without exceptions being filed by any party, the Board hereby adopts its Proposed Findings of Fact, Conclusions of Law, and Order and affirms the instant citation, characterization, and penalty imposed.

DATED: Honolulu, Hawaii, June 13, 2006

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
EMORY J. SPRINGER, Member

  
KATHLEEN RACUYA MARKRICH, Member

Copies sent to:

Leo B. Young, Deputy Attorney General  
Brian G.S. Choy, Esq.

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HAWAII LABOR RELATIONS BOARD

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	)	PROPOSED FINDINGS OF FACT,
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	)	ORDER
vs.	)	
	)	
KIEWIT PACIFIC COMPANY,	)	
	)	
Respondent.	)	

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PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter is before the Hawaii Labor Relations Board (Board) on remand from the First Circuit Court upon instruction from the Intermediate Court of Appeals in S.C. No. 24226, In the Matter of Director, Department of Labor and Industrial Relations v. Kiewit Pacific Company. This case arose from a Citation and Notification of Penalty issued on December 4, 1996 to Respondent KIEWIT PACIFIC COMPANY (KIEWIT) by Complainant DIRECTOR, DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS' (DIRECTOR) Division of Hawaii Occupational Safety and Health (HIOSH) for failing to cover shallow holes in the ground floor of its construction site. The DIRECTOR found KIEWIT thereby violated, inter alia, 29 CFR 1926.501(b)(4)(ii) in Citation 1 Item 1. KIEWIT filed a contest of the Citation and Notification and Penalty and on May 23, 2000, the Labor and Industrial Relations Appeals Board (LIRAB) reversed and vacated Citation 1 Item 1 finding, inter alia, that 29 CFR 1926.501(b)(4)(ii) applied to holes at heights above the lower levels. On June 21, 2000, the DIRECTOR then appealed LIRAB's decision to the First Circuit Court and on February 26, 2001, the First Circuit Court affirmed LIRAB's decision.

The DIRECTOR then appealed to the Hawaii Supreme Court which assigned the case to the Intermediate Court of Appeals. On January 8, 2004, the Court of Appeals found that 29 CFR 1926.501(b)(4)(ii) applied to tripping hazards caused by shallow holes on the ground level. The Intermediate Court of Appeals thereupon reversed and vacated Citation 1 Item 1 relating to the unprotected walking/working surface and remanded the

issues 1a and 1b<sup>1</sup> to the Circuit Court with the instruction to remand the issues of characterization and penalty back to LIRAB for hearing. On May 28, 2004, the Circuit Court issued an Order Remanding Matter to the Hawaii Labor Relations Board<sup>2</sup> Pursuant to the Notice and Judgment on Appeal, Filed by the Intermediate Court of Appeals on February 23, 2004.

On November 22, 2004, the DIRECTOR, by and through his counsel, advised the Board of the remand of this case and requested the Board to schedule a status conference to discuss the settlement of the case or to schedule the case for hearing. On November 24, 2004, the Board scheduled a status conference in this matter on December 8, 2004. The status conference, however, was continued to permit the parties to explore a settlement on the remaining issues in this case. Having failed to reach a settlement, the Board conducted a hearing in this matter on August 29, 2005.

After the parties addressed the scope of these proceedings, the Board indicated that it was inclined to conclude that the reversal of the Circuit Court's opinion and remand to the Board did not compel a conclusion that a violation occurred. Thus the issues before the Board were whether a violation occurred as stated in Citation 1 Item 1; if so, whether the characterization of serious is appropriate; and, if so, whether the \$1,125.00 fine is appropriate. Transcript of 8/29/05 hearing (Tr. 8/29/05), pp. 24-25. The parties stipulated that the Board was entitled to consider the entire prior evidentiary record. Tr. 8/29/05, pp. 23, 25, 90. The Board provided the parties with the full opportunity to present evidence and argument to the Board.

The DIRECTOR presented its HIOSH Compliance Officer David Nelson (Nelson) as a witness before the Board and subsequent to the hearing on September 26, 2005, submitted a copy of HIOSH's Field Operating Manual in effect in 1996 in response to KIEWIT's objections to the DIRECTOR's Exhibit No. 3. Thereafter, the DIRECTOR filed

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<sup>1</sup>In its Decision and Order, dated May 23, 2000, LIRAB set forth, inter alia, the following issues for determination:

- (1) Whether Respondent violated 29 CFR §1926.501(b)(4)(ii).
  - a. If so, is the characterization of the violation as "serious" appropriate. If not, what is the appropriate characterization, if any.
  - b. If so, is the imposition and amount of the proposed \$1,125.00 penalty appropriate.

<sup>2</sup>In 2002, the jurisdiction to hear HIOSH contests pursuant to Hawaii Revised Statutes (HRS) Chapter 396 was transferred from the LIRAB to the Hawaii Labor Relations Board.

the penalty from \$10,000.00 to \$500.00. LIRAB also reversed and vacated four other citations, including Citation 1 Item 1 which states as follows:

Citation 1 Item 1 Type of Violation: Serious

29 CFR 1926.501(b)(4)(ii) [Refer to chapter 12-121.2, HAR]  
Each employee on a walking/working surface was not protected from tripping or stepping into holes; i.e., only 5 of 13 holes (2' by 2', approximately 6-8" deep) were provided with covers.

Location: Retail buildings E & F

Date By Which Violation Must be Abated: 12/09/96  
Proposed Penalty: \$1125.00

LIRAB agreed with KIEWIT and concluded that the above standard did not apply to holes at ground level.

8. On June 21, 2000, the DIRECTOR filed an appeal to the First Circuit Court contesting LIRAB's Decision and Order.
9. On February 26, 2001, the First Circuit Court filed its Decision and Order Affirming the Decision of the Department of Labor and Industrial Relations Appeals Board Dated May 23, 2000 and entered Final Judgment on April 3, 2001.
10. On April 25, 2001, the DIRECTOR filed an appeal from the First Circuit Court's judgment relating to Citation 1 Item 1 to the Supreme Court. The Supreme Court then assigned the case to the Intermediate Court of Appeals.
11. On January 8, 2004, the Intermediate Court of Appeals issued an Opinion concluding that LIRAB erred by finding that 29 CFR § 1926.501(b)(4)(ii) was inapplicable to the holes on the ground floor. The Appeals Court agreed with the DIRECTOR's application of the instant standard to the ground level holes and stated:

We vacate in part, affirm in part, and remand. The April 3, 2001 final judgment and the underlying February 26, 2001 decision and order of the circuit court are vacated insofar as they affirm the LIRAB's reversal of Citation 1, Item 1, but are otherwise affirmed. The circuit court shall remand to the LIRAB with instructions to decide the issues (1(a) and 1(b), quoted above) it left unresolved in the wake of its reversal.

- c. a Gradall forklift, transporting pallets of CMU blocks past open holes to the CMU shell wall, could have one of its tires enter an open hole causing a pallet of CMU blocks to spill.
20. Workers stepping or tripping in uncovered holes could suffer a serious injury, a severe sprain or strain, which in turn, would have caused injured worker to miss several work days.
21. A Low Severity, Lesser Probability and a Gravity Based penalty of \$1,500 discounted 25% for good faith appropriately resulted in a penalty of \$1,125.00.
22. Respondent, except for cross-examining Nelson, did not present any testimony from witnesses on the remand.

#### PROPOSED CONCLUSIONS OF LAW

1. The Board has jurisdiction over this contested case pursuant to HRS § 396-11 and the First Circuit Court's May 28, 2004 Order remanding this case to the Board.
2. KIEWIT is an employer within the meaning of HRS § 396-3.
3. To establish a violation of a standard, the DIRECTOR must prove by a preponderance of evidence that: "(1) the standard applies, (2) there was a failure to comply with the cited standard, (3) an employee had access to the violative condition, and (4) the employer knew or should have known of the condition with the exercise of due diligence." Director v. Honolulu Shirt Shop, OSAB 93-073 at 8. (Jan. 31, 1996).
4. The DIRECTOR proved by a preponderance of evidence that KIEWIT violated 29 CFR § 1926.501(b)(4)(ii) by establishing that the cited standard applies; KIEWIT failed to comply with the standard; KIEWIT's employees had access to the hazard; and KIEWIT knew or should have known of the hazard with the exercise of reasonable diligence.
5. The Board concludes that the DIRECTOR met the burden of proving that KIEWIT violated the standard as described in Citation 1 Item 1.
6. The Board concludes that the DIRECTOR met his burden of proving that a severe sprain or strain constitutes a "Serious" violation and the penalty imposed is appropriate.

PROPOSED ORDER

The Board therefore affirms the instant citation, characterization, and penalty.

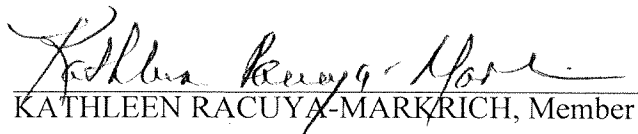
Citation 1 Item 1, for violation of 29 CFR § 1296.501(b)(4)(ii), the characterization as Serious, and penalty of \$1,125.00 are affirmed.

DATED: Honolulu, Hawaii, May 19, 2006.

HAWAII LABOR RELATIONS BOARD

  
BRIAN K. NAKAMURA, Chair

  
EMORY J. SPRINGER, Member

  
KATHLEEN RACUYA-MARKRICH, Member

FILING OF EXCEPTIONS

Any party adversely affected by the Proposed Findings of Fact, Conclusions of Law and Order may file exceptions with the Board, pursuant to HRS § 91-9, within ten days of the service of a certified copy of this document. The exceptions shall specify which proposed findings or conclusions are being excepted to with full citations to the factual and legal authorities therefore. A hearing for the presentation of oral arguments may be scheduled by the Board in its discretion. In such event, the parties will be so notified.

Copies sent to:

Leo B. Young, Deputy Attorney General  
Brian G.S. Choy, Esq.